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[18/07/1990; Ontario Court, Provincial Division (Canada); First Instance]
S. Del Carmen Miranda de Martinez v. G. Martinez-Jarquin (18 July 1990)

ONTARIO PROVINCIAL COURT, FAMILY DIVISION

Karswick Prov.Ct.J.

July 18, 1990

In The Matter of the Children's Law Reform Act

Between:

S.M.

Applicant

- and -

G.M.

Respondent

REASONS FOR JUDGMENT

Karswick Prov.Ct.J. This proceeding arises in circumstances where there is an allegation that the father abducted his children from their mother who was then living in El Salvador. Subsequently, the father and children established a residence in the City of Mississauga. The mother has travelled to this jurisdiction and now applies to this Court to have her children returned to her so that she and they can return to El Salvador.

On September 18, 1989, the Court in El Salvador granted the mother a Decree of Divorce together with an Order of Custody.

On June 22, 1990, upon the ex parte application of the mother, this Court made an Interim Order granting custody of the children to Applicant, directed the Respondent to deliver both children to the Applicant forthwith, and further directed the police and sheriff's officers to locate and apprehend the children and to deliver them to the Applicant and to make such entry and search as is necessary at any time of the day or night. The Applicant mother was directed to remain in Ontario with the children until further order of the Court.

On June 27th, at the request of the Respondent father, the matter was adjourned to July 4th, to permit him to file his material. The Order made June 22nd was confirmed, and the

Respondent was further restrained from having any contact with the Applicant or the children. Further, the Court requested the Administrator to contact the Official Guardian and counsel for both parties with the request that there be an investigation and interview with the children.

The Official Guardian's Office informed the Court Administrator that there was insufficient time to conduct the investigation and interview. In the circumstances, no investigation was commenced by the Official Guardian's Office.

The Respondent father submits that custody of the children should remain with him and that the children should not be required to return to El Salvador. He relies on the provisions of s. 42(1)(d) and s. 44 of the Children's Law Reform Act.

s. 42(1) Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied,

(d) that the order of the extra-provincial tribunal is contrary to public policy in Ontario.

s. 44 Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child if the court is satisfied that the child would, on the balance of probability, suffer serious harm if,

(a) the child remains in the custody of the person legally entitled to custody of the child;

(b) the child is returned to the custody of the person entitled to the custody of the child; or

(c) the child is removed from Ontario.

The Court then conducted a hearing to consider these issues. The substantial affidavit material was reviewed. Both parents testified and were cross-examined upon their affidavits.

The child, G., indicated that he wished to speak to the Judge. He is eleven years old. After all the evidence had been concluded, I suggested he could come into the courtroom and speak to us informally in the presence of the parents and their counsel. That suggestion appeared to be acceptable. However, just before I recommenced the hearing, I was advised the child had left the courtroom as he was too nervous.

I discussed the matter further with counsel and then decided to meet with G. in my Chambers. The court reporter was present as well as the Spanish interpreter. However, it was not necessary to rely on the interpreter as this youngster has become extremely fluent in English. His discussion with me was on the basis that a transcript would be prepared and placed in a sealed envelope not to be opened except by a Judge's order and upon notice to him.

The parties were born in El Salvador and were married on May 5, 1978. They have two children, namely G., born November 6th, 1978 and S., born on December 4, 1985.

Mrs. M. now uses the name Ms. M. She stated that they separated in January 1987. Mr. M. however states that they separated in December, 1985. The mother further stated that the children remained in her care and that the father had visiting rights to them by an informal agreement. These visits were not generally over night. However the father testified that custody was shared by the parents with each parent having the de facto custody on alternate weeks. I am inclined to accept Ms. M.'s testimony on these issues.

In May, 1988, Ms. M. began divorce proceedings in which she claimed custody. She stated that on April 21, 1989, the Respondent did not return the children from a visit and she had not seen them since that date. Even though the Respondent had absconded from El Salvador, he instructed his lawyer to appeal the earlier decision to the Salvadorian Court of Appeal. However, this appeal was dismissed. Ms. M. made desperate inquiries of relatives in El Salvador and of various agencies. At one point, she travelled to Winnipeg where she contacted the local crown attorney for assistance in locating and apprehending her children. However, before the Winnipeg, police could arrest the Respondent, he had moved to Mississauga.

Ms. M. is employed by "*" in El Salvador. This is a United Nations Human Rights Organization which arranges for transportation of Salvadorians who are able to leave El Salvador for other countries. She testified that there is no danger in her work since this organization assists all worthy applicants, whether they are from the Right or Left. She produced a letter from the Chief of Missions of this organization stating that none of their employees have been the victims of threats or violence.

She continues to live in a quiet neighbourhood in San Salvador where children can play in the streets and parks and attend school on a regular basis. There is a university in the area where a number of Jesuit priests, their cook and her daughter were murdered by army personnel. However, this was an isolated incident in the neighbourhood and the priests were alleged to have been participants in the conflict. Arrests have been made and the suspects are being prosecuted in the Courts.

Since Ms. M. is employed by a United Nations organization, she has been able to make arrangements to leave the country with her children if there is any danger to them. However, there is no such a danger at this time. This evidence was confirmed by M.M. who recently arrived from San Salvador and was a student at the university where the priests were murdered.

Mr. M. confirms that he responded to the divorce proceedings commenced by his wife but that ensuing events compelled him to leave with the children. He stated that he became involved with M.C. and that they have a child M. born jaunty 16, 1985, in El Salvador.

He states that on March 16, 1989, M.C. and their daughter travelled from El Salvador to Houston Texas. On April 7, 1989, he and his two other children G. and S. left illegally from El Salvador through Guatemala to Houston where they joined M.C. and her daughter M.. On April 21, 1989, they left Houston for Winnipeg where they resided from May, 1989, to May, 1990, when they relocated in Mississauga for employment purposes.

He states that the departure of himself and the children was a planned event which was carried out on a gradual basis so as not to attract the attention of the authorities, to obtain passports for his children and to obtain the necessary documentation and references for the purposes of obtaining visas to the United States and to dispose of his assets. He states that his motivation for leaving El Salvador was to escape persecution from the government authorities for his political opinions and that lie feared for the safety of himself and the children. In August, 1989, at a hearing in Winnipeg, the Immigration and Refugee Board granted him, Ms. C. and the children convention refugee status.

He stated that he had taken photographs in a clandestine manner of government authorities detaining and assaulting demonstrators. These photographs were then forwarded to the Archbishop's office in El Salvador through the Human Rights Commission of the University of El Salvador. He testified that on a number of occasions he was detained by government

authorities who destroyed his film, blind-folded him, interrogated him, beat him and threatened him with death if he continued such activities.

He also testified that in July, 1988, he observed his wife and his children leaving the vehicle of R.L. whom he knew to be a member of the death squads. An argument developed between him and Mr. L. which eventually lead to Mr. L. shooting him in his leg. About a month later, he stated that he was again assaulted by Mr. L. at a beach.

Ms. M. denies that her husband was taking any photographs for any Human Rights organization. Ms. C. states however that Mr. M. did take such photographs and that she was employed, at one time, for such an organization.

Ms. M. denies that she was involved with Mr. L. She states that he drove her and the children home one afternoon in the rain from a friend's home. When her husband saw them, lie attacked her and beat her to the ground. When Mr. L. asked him to stop the beating, this just angered him all the more. Both men were armed. She managed to take the children to the house so that they would be safe and when she came out she saw Mr. L. shoot her husband. She and the children then drove Mr. M. to the hospital to have his wound attended.

I note that Mr. M. has been declared by the Immigration Board to be a political refugee. However, Ms. M. was not a party to these immigration proceedings and therefore, cannot be bound by them. Moreover, she denies any knowledge of Mr. M.'s involvement in political activities. She denies any knowledge of the allegations of harassment and torture made by Mr. M. It should also be noted that Mr. M. did not tell the Immigration Board that he had illegally entered the country with the children and that he had forged his wife's consent to the removal of the children from El Salvador. He also failed to notify the immigration authorities of the divorce and custody proceedings in El Salvador and that there was an Order that he not remove the children from that country without the consent of his wife.

With respect to the issue which arises pursuant to section 42(1)(d), I must now consider whether the custody order made in El Salvador is contrary to public policy in Ontario.

I note that the Respondent had notice of those proceedings. He attorned to the jurisdiction of that Court and even retained counsel to continue to appeal the trial Judge's decision even though he was residing in Canada. The Court in El Salvador carefully considered the relevant issues and required the preparation of an extensive home study. There is no suggestion by anyone at this hearing that the Court in El Salvador conducted its proceedings in any improper, oppressive or unjust manner. Indeed, both parties accepted the validity and integrity of both the Salvadorian Court process and Court Order.

S. 47 of the Children's Law Reform Act incorporates the provisions of what is commonly referred to as the Hague Convention.

The preamble to the Convention is as follows:

"The States signatory to the present Convention,

Firmly convinced that their interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect.

Article 1.

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 3.

The removal or the retention of child's to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

It is my view, that by incorporating the provisions of the Hague Convention into its statute, the Province of Ontario has formally and emphatically declared its support for the paramount policy of discouraging international child abduction and requiring that matters of custody and access should be determined by the courts of the State of the habitual residence of the children.

It is noted that the Canadian Immigration Board has declared Mr. M. and his children to be convention refugees. However, as already noted, Ms. M. was not a party to that proceeding and further Mr. M. withhold some important evidence from that Tribunal. The findings of that Tribunal must be given significant weight when considering the issues before this Court. It is preferable that any decision of this Court should not be seen to be in contradiction of the findings of the Immigration Board. However, the issue before this Court is different than that which was determined by the Immigration Board. The parties are different and the purposes of the hearing is different as well. In any event, if there is to be perceived to be a conflict, then I believe that such conflict must be resolved in favour of the policy enunciated by the Province of Ontario and as embodied in the Hague Convention.

In the circumstances, I find that the Order for Custody of the Court in El Salvador is not contrary to public policy in Ontario.

With respect to s. 44, 1 must now consider whether the return of the children to El Salvador would, on the balance of probability, result in serious harm to them.

The research document prepared by the Immigration and Refugee Board Documentation Centre and entitled "El Salvador - Country Profile" describes a country with an extremely volatile political and social character.

The evidence presented to the Court, however, does not show that the lives of the children or the mother have ever been in danger. Indeed, the evidence is to the contrary.

Further, at the time that the children were removed from their homeland, they were living in a quiet, peaceful neighbourhood. Mr. M. did not suggest that they were fleeing from some impending threat to their safety.

The testimony at this hearing suggests that Mr. M. often longed to live in the United States and that his present move was at least partly motivated by economic factors. There is also a suggestion that he took the children with him so that he would be ensured of their custody to the exclusion of the mother.

The crucial issue is the concern for the children being the victim, of serious harm if allowed to return to El Salvador, The children have not been harmed before and do not apprehend any risk of harm. They have felt happy and secure with their mother in their habitual residence,

I find that the Respondent has failed to demonstrate, on the balance of probability, that the children would suffer serious harm if returned to El Salvador.

Ms. M. has filed a detailed statement of her expenses indicating her disbursements to be \$2422.29 as a result of her having to come to this jurisdiction to seek the return of her children.

In the circumstances, I make an Order recognizing the Order of the Court in El Salvador granting custody of the children to the mother and direct that the children should remain with the mother so that they all may return to their home in El Salvador.

I further direct that Mr. M. pay the disbursements of Ms. M. in the sum of \$2500.00 and further that he pay her legal costs in the sum of \$3000.00. This total of \$5500.00 is to be paid forthwith.

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